83-541

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

REPUBLIC INDUSTRIES, INC.,

Petitioner,

v.

TEAMSTERS JOINT COUNCIL
NO. 83 OF VIRGINIA PENSION FUND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does retroactive application of the "withdrawal liability" provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, *et seq.*, violate the Due Process Clause of the Fifth Amendment?**

2. Do the MPPAA provisions for assessment, collection and adjudication of "withdrawal liability" violate the Fifth and Seventh Amendments, and Article III, § 1, by taking property without just compensation and empowering self-interested private claimants to assess and collect money from their adversaries prior to any opportunity for impartial hearing, and to make "determinations" of fact and law, under vague language permitting the arbitrary and capricious exercise of discretion, which are later arbitrated but which are not subject to the *de novo* review of a private arbitrator, whose award is not subject to the *de novo* review of an Article III court?

**The certification requirements of 28 U.S.C. § 2403(a) may be applicable. The Clerk of the Court of Appeals for the Fourth Circuit certified to the Attorney General that the constitutionality of an Act of Congress was being drawn in question. Appendix at p. 52a.

PARTIES INVOLVED

The petitioner, Republic Industries, Inc. ("Republic"), is a closely held corporation organized under the laws of Delaware which has its principal place of business in Kansas City, Missouri. Dominion Banque shares, a Missouri bank holding company with its principal place of business in Kansas City, Missouri, may be deemed to be an affiliate of Republic.

The respondent, the Teamsters Joint Council No. 83 of Virginia Pension Fund (the "Fund"), is an unincorporated association established pursuant to an agreement and declaration of trust between various local unions in Virginia that are affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters") and various employers having collective bargaining agreements with those locals.

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Petitioner, Republic Industries, Inc. ("Republic"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered September 9, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the separately bound Appendix filed with this petition, at pp. 2a-31a. The District Court's opinion is reproduced in the Appendix at p. 32a. It is otherwise reported at 3 BNA Employee Benefits Cases [EBC] 2545 (E.D.Va. Dec. 29, 1982).

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1983. The jurisdiction of this Court is in-

voked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions directly involved are the Due Process Clause and the Just Compensation Clause of the Fifth Amendment, the Jury Trial Clause of the Seventh Amendment, and Article III, Section 1, of the Constitution of the United States. Additionally, petitioner relies by analogy on the principles underlying the Ex Post Facto and Bill of Attainder Clause of Article I, Section 9, Clause 3, and the Impairment of Contracts Clause of Article I, Section 10, Clause 1, insofar as they inform the meaning of the Due Process Clause of the Fifth Amendment. These constitutional provisions are reproduced in the Appendix at 54a.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, *et seq.*, which amended the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829, *et seq.* The relevant MPPAA provisions are reproduced in the Appendix at pp. 55a-149a, as set forth in the Statutes At Large. The MPPAA provisions are otherwise set forth at 29 U.S.C. §§ 1381, *et seq.* (Supp. V 1981). Cross-references to the United States Code citations have been provided in the Appendix, and the petition generally cites to the United States Code (Supp. V 1981) rather than the Statutes at Large.

STATEMENT

This case, like many others pending throughout the United States, involves federal constitutional challenges to the "withdrawal liability" provisions of the Multiem-

ployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381, *et seq.* (Supp. V 1981), pursuant to which Republic has been subjected to "withdrawal liability" claims exceeding its entire net worth that arise out of a pre-enactment "withdrawal."

In short, MPPAA requires an employer which permanently terminates its contributions to a multiemployer pension fund for any reason[1] to pay a "withdrawal liability," which is a portion of the unfunded vested benefit liability of the pension fund. *Id.* § 1381. The statute directs the pension fund itself to decide whether a "withdrawal" activating liability has occurred and, if so, the amount of the liability. *Id.* § 1382. In determining the amount owed to it, the fund and its actuary can use the data available, even if incomplete, and any actuarial assumptions that they deem reasonable "in the aggregate". *Id.* §§ 1393(a)(1), (b)(2). The fund also can use any one of several methods of allocating its unfunded liability to employers. *Id.* § 1391. The fund must set a schedule for payment of the liability and issue a notice and demand for payment, in accordance with the schedule, to the employer. *Id.* § 1399(c)(1). The statute renders the fund's claim

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[1] *See* 29 U.S.C. § 1383(a) (Supp. V 1981). In one case, an employer committed a "withdrawal" by terminating operations as a result of a municipality's exercise of its power of eminent domain. *Keith Fulton & Sons, Inc.* v. *New England Teamsters and Trucking Industry Pension Fund*, ___ F.Supp.—C.A. No. 81-2738-S (D.Mass. Aug. 3, 1983). In another, a "withdrawal" was committed when the employer's workers voted to decertify their bargaining representative, an action which had the result of terminating the employer's contributions to the particular pension fund affiliated with the decertified union. *Aronson Tire Co.* v. *Pisano*, No. 81-2554 (D.Mass. filed Oct. 7, 1981).

Though a permanent cessation of contributions, whether voluntary or involuntary, generally constitutes a "withdrawal" activating liability, there are exceptions made for certain industries. *See* 29 U.S.C. §§ 1383(b)-(d) (Supp. V 1981).

immediately payable on the schedule it has set notwithstanding any defenses the employer might assert to the claim. *Id.* § 1399(c)(2). The statute requires that disputes over the statutory validity of the claim or the amount of the liability be resolved by private arbitration. *Id.* § 1401(a)(1). Prior to and during arbitration, payments still must be made at the times and in the amounts the fund has demanded. *Id.* § 1401(d). In arbitration, all the "determinations" made by the fund are presumed correct "unless" shown to be "unreasonable or clearly erroneous," a provision which immunizes the fund's "determinations" from *de novo* review. *Id.* § 1401(a)(3)(A). The arbitration award is subject to judicial review, but it generally must be conducted in accordance with the provisions of MPPAA and the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, that preclude *de novo* review. *See* 9 U.S.C. § 10; 29 U.S.C. §§ 1401(b)(3), (c)(Supp. V 1981). MPPAA, which was not signed into law until September 26, 1980, retroactively imposes liability for all "withdrawals" occurring after April 28, 1980. 29 U.S.C. § 1461(e)(2)(A)(Supp. V 1981).

This case is one of six in which Republic challenges the constitutionality of retroactive application of the withdrawal liability provisions of MPPAA. The cases seek declaratory and injunctive relief from an aggregate of $19,744,000 in withdrawal liability claims asserted under MPPAA by various multiemployer pension funds, an amount that substantially exceeds Republic's entire net worth.[2] Unfortunately, jurisdictional and venue con-

[2] If paid on the installment-payment schedules unilaterally established by the funds, the aggregate amount claimed, with interest, exceeds $25,537,000. Republic's net worth as of August 1981 was $9,462,802. Its *pre*-tax income from continuing operations for its 1980 fiscal year was $595,505. The *annual* installments of withdrawal liability demanded by the funds approximate $4,000,000. Affidavit of R. B. Riss ¶¶ 43-45, Appendix at 160a-161a.

siderations precluded litigation of the constitutional issues raised by Republic in a single forum.[3] Three of Republic's other pending cases have been stayed, either *sua sponte* by the District Court, or by agreement of the parties. *Johnson Motor Lines, Inc., et al.* v. *Central States, Southeast and Southwest Areas Pension Fund*, No. 81 C 3703 (N.D. Ill. filed July 1, 1981); *Johnson Motor Lines, Inc., et al.* v. *Trucking Employees of North Jersey Welfare Fund Local 560 Pension Account*, No. 81-2344 (D.N.J. filed July 24, 1981); *Republic Industries, Inc.* v. *Central Pa. Teamsters Pension Fund*, 534 F.Supp. 1340 (E.D. Pa. 1982), *rev'd and remanded*, 693 F.2d 290 (3d Cir. 1982). In one case, Republic has interposed constitutional defenses in an action brought to collect unpaid installments of claimed withdrawal liability prior to arbitration of the validity of the fund's claim. *Teamsters Pension Fund of Philadelphia and Vicinity* v. *Republic Industries, Inc.*, No. 83-1070 (E.D. Pa. filed Mar. 3, 1983). In another, the District Court has declared MPPAA unconstitutional as retroactively applied and permanently enjoined its enforcement against Republic. *Republic Industries, Inc.* v. *New England Teamsters and Trucking Industry Pension Fund*, ____ F.Supp. ____, C.A. No. 81-2551-S (D. Mass. Aug. 3, 1983), *appeal docketed*, No. 83-1657 (1st Cir.). In the case at bar, the Court of Appeals affirmed the District Court's judgment that retroactive application of MPPAA is constitutional.

In addition to Republic's six cases, there are scores of other pending cases in which litigants are challenging the

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[3] The Judicial Panel on Multidistrict Litigation declined to consolidate cases, including Republic's, which attacked the constitutionality of MPPAA because, though raising common issues of law, they did not raise substantially common issues of fact. *In re Central States, Southeast and Southwest Areas Pension Fund "Withdrawal Liability" Litigation*, MDL No. 495 (J.P.M.L. March 9, 1982).

constitutionality of MPPAA's withdrawal liability provisions, more than 70 of which involve MPPAA's retroactive application. Jurisdictional Statement, *Pension Benefit Guaranty Corp.* v. *R. A. Gray & Co.*, No. 83-245, at 11 & App. E, pp. 53a-75a (U.S. filed Aug. 15, 1983). Many, if not most, involve constitutional claims substantially similar to those asserted by Republic. As the Court of Appeals recognized, Appendix at 16a, its decision upholding the constitutionality of retroactive application of MPPAA is in square conflict with the contrary decision of the Court of Appeals for the Ninth Circuit in *Shelter Framing Corp.* v. *Pension Benefit Guaranty Corp.*, 705 F.2d 1502 (9th Cir. 1983), from which the Pension Benefit Guaranty Corporation ("PBGC") has filed what purports to be an appeal of right under 28 U.S.C. § 1252 in this Court.[4] *Ibid.*

This action arose out of the termination of the operations of Johnson Motor Lines, Inc., Republic's predecessor in interest,[5] on August 8, 1980. Prior thereto, Johnson had been an interstate motor carrier of freight and, pursuant to various collective bargaining agreements with

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[4] PBGC is a corporation—established within, but having an identity independent of, the Department of Labor—which presumably has independent litigating authority in this Court that other "agencies" of the United States, 28 U.S.C. § 1252, do not. *Compare* 28 U.S.C. § 518(a) (Supp. V 1981), *with* 29 U.S.C. §§ 1302(b), (f) (Supp. V 1981). PBGC was created for the purpose of insuring the payment of pension benefits guaranteed under ERISA. 29 U.S.C. § 1302(a) (1976). As an insurer, its contractual obligations to multiemployer funds give it a significant pecuniary state in the enforceability of MPPAA's "withdrawal liability" provisions.

[5] Republic acquired 100% of Johnson's stock in June 1979. After the termination of its operations, Johnson's assets were sold. Those that could not be sold to third parties were acquired by Republic, as Johnson was liquidated pursuant to 26 U.S.C. §§ 334(b) and 337, and dissolved under the law of the State of North Carolina. Affidavit of R. B. Riss (hereinafter "Riss Aff.") ¶¶ 32-33, Appendix at 158a.

Teamsters locals, had made periodic contributions to various multiemployer pension funds, including respondent. Those agreements required that defined contributions be made in exchange for specified units of work. When the work stopped, the contractual duty to contribute ceased as a consequence.

At the time Johnson's business was terminated because of severe operating losses and lender pressure, none of its officers or directors, nor any of Republic's, had any knowledge that they would or might create a "withdrawal liability" by ending Johnson's operations, and they received no advice from their attorneys or accountants that any such liability did or might exist. Riss Aff. ¶¶ 30-31, Appendix at 157a-158a. Moreover, under the law in effect at the time the MPPAA-liability-activating event occurred, ERISA imposed no liability on Johnson for cessation of its pension contributions.[6] Seven weeks later, MPPAA became law. It defines the cessation of pension contributions resulting from the closing of Johnson's business as a "withdrawal" and subjects Republic to claims based on Johnson's pre-enactment "withdrawal" that substantially exceeds Republic's entire net worth.

Johnson had already received a demand to pay over $16,000,000 in withdrawal liability from another fund when respondent's counsel sent Johnson a letter, dated July 3, 1981, which declared Johnson's withdrawal liabil-

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[6] Johnson, however, was subject to a contingent termination liability, payable to PBGC, that would be activated only if: (1) a multiemployer pension fund terminated with an unfunded vested benefit liability, and (2) the PBGC exercised discretion to insure fund benefits. If PBGC chose to insure the terminated fund's benefits, all employers which had contributed to the fund during the five years prior to its termination were required to reimburse PBGC for any funds it paid out, but no employer's share of this contingent termination liability could exceed 30% of its net worth. 29 U.S.C. §§ 1362(b)(2), 1364 (1976).

ity to be $189,107. Unlike the other fund, however, Respondent had concluded that the statute's "trucking industry" exception applied, and therefore demanded that, in lieu of payment of the liability claimed, Johnson post security for 50% of the claim pending a PBGC determination whether the Fund's contribution base had been "substantially damaged" by Johnson's withdrawal. 29 U.S.C. § 1383(d)(Supp. V 1981); Appendix, p. 167a.

In response, Republic protested that the Fund had erred in calculating the amount owed by failing to exclude contributions made on behalf of employees who worked at a truck terminal that had been closed prior to April 29, 1980. *See id.* § 1397(a)(2). Once those contributions were excluded, the amount claimed would become *de minimis*. *See id.* § 1389; Appendix, p. 168a.

The Fund rejected Republic's reliance on § 1397(a)(2) because it determined that the closed truck terminal was not a "facility" within the meaning of the statute, and that the transfer of five employees from that terminal to another terminal located eight miles away would render that provision inapplicable in any event. On the basis of this statutory "determination," *id.* § 1401(a)(3), the Fund reiterated its demand for security. Appendix at 173a-174a.

Republic then tendered an irrevocable letter of credit as security. Thereafter, while the Fund was considering whether the letter of credit was acceptable security in the event of Republic's bankruptcy, it advised Republic that it was in the process of re-examining whether the trucking industry exception applied because of its uncertainty over the statutory meaning of the term "employer."[7] Republic protested that the Fund had no right to revoke its

[7] The uncertainty was whether, in determining if the Fund derived "substantially all of [its] contributions . . . [from] *employers* primarily engaged in the short and long haul trucking industry," 29 U.S.C.

prior determination that the "trucking industry" exception applied. The Fund disagreed. And, over a year after making its initial demand for security under § 1383(d), the Fund advised Johnson that it had determined the exception did not apply and that Johnson therefore was required to begin paying the amount claimed on the schedule set by the Fund, prior to and during any arbitration of its "determination" of the exception's inapplicability. Id. § 1401(a)(3); Appendix, pp. 179a-183a.

Republic then invoked the jurisdiction of an Article III court constitutionally empowered to say what the law means by filing this action for declaratory and injunctive relief, in which Republic challenged the constitutionality of the withdrawal liability provisions of MPPAA. The Fund moved to dismiss on the ground that Republic had failed to exhaust the private arbitration process mandated by the statute for the resolution of "withdrawal liability" disputes. Republic moved for a preliminary injunction. After the Court had denied both motions, the Fund answered and counterclaimed for payment of the withdrawal liability claimed, and Republic asserted its statutory defense under 29 U.S.C. § 1397(a)(2) (Supp. V 1981). Ruling on cross-motions for summary judgment, the District Court concluded that it could not decide the statutory defense raised by Republic, as the Court believed that the question whether the truck terminal closed in 1979 was a "facility" should be left for the private arbitrator. The Court, granting the Fund's cross-motion for summary judgment, entered the declaratory judgment upholding MPPAA's constitutionality, which has been affirmed by the Court of Appeals.

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§ 1383(d)(2)(Supp. V 1981) (emphasis added), the Fund should look only to the employers which actually made the contributions, *e.g.*, Johnson, or rather to any "control groups" to which the contributing employers might belong, *e.g.*, Republic. *See* 29 U.S.C. § 1301(b)(1), *construed in PBGC* v. *Ouimet Corp.*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981).

REASONS FOR GRANTING THE WRIT

In so far as it upholds the constitutionality of retroactive application of the withdrawal liability provisions of MPPAA, the decision of the Fourth Circuit is in square conflict with the decision of the Ninth Circuit in *Shelter Framing Corp.* v. *PBGC*, 705 F.2d 1502 (9th Cir. 1983), which is reason enough to grant the writ. *See* Sup. Ct. Rule 17.1(a).

The existence of this inter-Circuit conflict illustrates the need for this Court to re-examine its prior precedents, for the inter-Circuit conflict is largely the product of the inconsistent results this Court itself has reached respecting the constitutionality of retroactive statutes. Lacking clear guidelines from this Court, the lower courts have applied the four-pronged constitutional test articulated by the Seventh Circuit in *Nachman Corp.* v. *PBGC*, 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional issues*, 442 U.S. 940 (1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980), which has never received this Court's stamp of approval.

This Court should harmonize its inconsistent precedents, and articulate a clear standard of review for legislation which is not only retrospective in effect but also retroactive in application. This can be done most effectively by focusing on, and squarely addressing, the question whether the citizen's right to notice and fair warning is a "fundamental" constitutional right that, when impaired by a statute imposing a disabling civil liability triggered by pre-enactment conduct, shifts to the Government the burden of advancing an extraordinary justification for a statute which deprives the citizen of any opportunity to choose his course of conduct in light of the law in effect at the time he acts.

In addition, the petition presents a number of other federal constitutional issues respecting the validity of

MPPAA's provisions for the assessment, collection and adjudication of "withdrawal liability" claims, questions which were erroneously decided by the Court of Appeals, which are substantial, and which warrant this Court's attention if the Court upholds the constitutionality of retroactive application of MPPAA.

I

An Inter-Circuit Conflict Exists As To Whether Retroactive Application Of MPPAA Is Constitutional

That the Fourth Circuit's decision upholding the constitutionality of retroactive application of MPPAA is in square conflict with the Ninth Circuit's ruling in *Shelter Framing Corp.* v. *PBGC*, 705 F.2d 1502 (9th Cir. 1983), is apparent from the face of its opinion. Appendix at 14a-19a. The District Courts are in sharp conflict on this question as well. *Compare, e.g., Coronet Dodge, Inc.* v. *Speckmann*, 553 F.Supp. 518 (E.D. Mo. 1982), *appeal docketed*, No. 82-2554 (8th Cir.); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 549 F.Supp. 404 (S.D.N.Y. 1982), *appeal docketed*, No. 83-7004 (2nd Cir.); and *Peick* v. *PBGC*, 539 F.Supp. 1025 (N.D. Ill. 1982), *appeal docketed*, No. 82-2081 (7th Cir.); *with Warner-Lambert Co.* v. *United Retail and Wholesale Employees Teamster Local No. 115 Pension Plan*, ___ F.Supp. ___, C.A. No. 82-1080 (E.D. Pa. Aug. 10, 1983), *appeal docketed*, No. 83-1676 (3rd Cir.); *Republic Industries, Inc.* v. *New England Teamsters and Trucking Pension Fund*, ___ F.Supp. ___, C.A. No. 82-2551 (D. Mass. Aug. 3, 1983), *appeal docketed*, No. 83-1657 (1st Cir.); and *Sibley, Lindsay & Curr Co.* v. *Bakery, Confectionery & Tobacco Workers Int'l Union*, 566 F.Supp. 32 (W.D.N.Y. 1983), *appeal docketed*, No. 83-7328 (2nd Cir.).

That the lower courts are in conflict should not be surprising for this Court has sent inconsistent signals to

the lower courts with respect to the constitutionality of statutes which are retroactive either in application or effect. *Compare, e.g., Allied Structural Steel Co* v *Spannaus*, 438 U.S. 234 (1978); *Railroad Retirement Bd.* v. *Alton R.R. Co.*, 295 U.S. 330 (1935); *and Untermyer* v. *Anderson*, 276 U.S. 440 (1928); *with United States* v. *Darusmont*, 449 U.S. 292 (1981); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); and *Veix* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940). *See also United States* v. *Security Industrial Bank*, 51 U.S.L.W. 4007 (U.S. Nov. 30, 1982).

Wanting clear guidance from this Court, all the lower courts that have addressed the constitutionality of retroactive application of MPPAA have been forced to resort to the nebulous, four-pronged test first articulated by the Seventh Circuit in *Nachman Corp.* v. *PBGC*, 592 F.2d 947 (7th Cir. 1979), which several courts have assumed bears the *imprimatur* of this Court because it declined to review the constitutional questions presented in *Nachman*, 442 U.S. 940 (1979), and affirmed the judgment on statutory grounds,[8] 446 U.S. 359 (1980). *See, e.g., A-T-O, Inc.* v. *PBGC*, 634 F.2d 1013, 1024 (6th Cir.

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[8] In *Nachman* the Seventh Circuit "was required to confront petitioner's constitutional argument," 446 U.S. at 367, only because it had construed the statute as altering the employer's contractual obligations to the pension fund by "invalidat[ing] exclusion of liability clauses in pension plans agreed upon prior to ERISA." 592 F.2d at 958. This Court, in contrast, said that the termination liability provisions of ERISA did not "deny employers any right to place a contractual limit on their direct liability to their employees." 446 U.S. at 385. Rather, ERISA created a "new liability," triggered by post-enactment conduct, that was payable to PBGC, not the pension fund, *id.* at 383, that "careful[ly] . . . approached the problem of retroactivity," *id.* at 382, and that placed a "reasonable ceiling" on employer liability, *id.* at 386. Given this Court's construction of the statute, it is questionable whether there was any constitutional problem to address.

1980); *PBGC* v. *Ouimet Corp.*, 630 F.2d 4, 12 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); *Peick* v. *PBGC*, 539 F.Supp. 1025, 1040 (N.D. Ill. 1982), *appeal docketed*, No. 82-2081 (7th Cir.). That certain lower courts have seized upon the denial of *certiorari* in *Nachman* as a basis for upholding retroactive application of MPPAA under the *Nachman* test simply underscores how much the lower courts need further guidance, for this Court has, time and again, unequivocally told the lower courts not to construe a denial of certiorari as any *sub silentio* indication that this Court "approves" either the result or the reasoning of the court whose judgment is sought to be reviewed. *E.g.*, *Hughes Tool Co.* v. *TWA, Inc.*, 409 U.S. 363, 365 n.1 (1973); *Brown* v. *Allen*, 344 U.S. 443, 489-97 (1953); *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-19 (1950). To the extent that the judgment of the Court of Appeals is founded upon any such misapprehension, it is clearly erroneous. *See* Appendix at 13a, n.9.

That an inter-Circuit conflict exists notwithstanding a unanimity of opinion regarding the applicability of the *Nachman* test, which purports to elucidate the standard of review articulated in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), obfuscates the real basis for the conflict. The conflict exists, not because the Ninth Circuit and the Fourth Circuit reached inconsistent judgments regarding the appropriate factors to be weighed, but rather principally because the Ninth Circuit believes that the citizen has a right to rely on the law in effect at the time he acts and is not required to guess what the law will become, 705 F.2d at 1511, while the Fourth Circuit believes that bills pending in Congress can give constitutionally adequate notice and fair warning even though they are not part of the law of the land, Appendix at 17a. Even assuming, *arguendo*, that the *Nachman* test governs the constitutionality of a statute which is retroac-

tive in application—like MPPAA, but unlike the *Nachman* statute which applied only prospectively—this Court must reconcile the conflicting notice standards applied by the Ninth and Fourth Circuits.

That a conflict exists is, in large measure, attributable to seemingly inconsistent precedents of this Court. In *United States* v. *Darusmont*, 449 U.S. 292 (1981), this Court upheld the constitutionality of a federal income tax statute which merely increased the rate of taxation and decreased the allowable exemption involved but which did not create any "new tax." *Id.* at 299-300. In that factual context, the Court responded to the taxpayer's contention that he "had no notice, either actual or constructive, of the forthcoming . . . changes" by noting that he was "hardly in a position to claim surprise" for the "proposed increase in rate had been under public discussion for almost a year before its enactment" and the taxpayer therefore had "ample advance notice of the increase." *Id.* at 299.

In *Untermyer* v. *Anderson*, 276 U.S. 440 (1928), however, this Court declared unconstitutional retroactive application of a gift tax statute which created a new tax, even though a final House-Senate conference report on the bill was near approval when the taxpayer made the gift which was not taxable under the law in effect at the time he acted. Responding to the contention that it was not unconstitutional to apply the statute to a transaction that occurred "while the bill containing the questioned provisions was in the last stage of progress through Congress," this Court ruled that the taxpayer "may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures." *Id.* at 445-46.

One District Court whose analysis has been relied upon by nearly every court that has upheld the con-

stitutionality of retroactive application of MPPAA, including the District Court and the Fourth Circuit in the case at bar, appears to have concluded that *Untermyer* was effectively overruled by *Darusmont*. *See Peick* v. *PBGC*, 539 F.Supp. 1025, 1054 n.73 (N.D. Ill. 1982), *appeal pending*, No. 82-2081 (7th Cir.). It was not. *Untermyer* was discussed with apparent approval in *Darusmont* and distinguished. *See* 449 U.S. at 299. And, the cases are distinguishable.

Statutes which alter merely the rate of taxation but which do not create a new tax do not deprive the citizen of notice and fair warning of the conduct triggering the increased liability, even when applied retroactively. Moreover, contrary to the views of the Fourth Circuit, Appendix at 17a, tax cases are *sui generis* because taxes are simply "a way of apportioning the cost of government" from which "no citizen enjoys immunity" because all citizens share in the benefits thereof. *Welch* v. *Henry*, 305 U.S. 134, 146-47 (1938). As *Darusmont* makes clear, not all tax cases are alike. Income tax cases are not like gift tax cases. 449 U.S. at 299. The income taxpayer, unlike the taxpayer who makes a gift not taxable when made, is unlikely to bite off his nose to spite his face, *i.e.*, refuse income, simply because the Government needs a somewhat larger share.

For all these and other reasons, the Fourth Circuit's reliance on *Darusmont* and *United States* v. *Hudson*, 299 U.S. 498 (1937), another income tax case, for the proposition that Republic and Johnson had "fair warning" of its "potential liability," Appendix at 17a, was misplaced. MPPAA did not alter merely the remedial consequences of primary duties already defined by the law in effect at the time the conduct occurred. MPPAA created a *new* liability-creating incident—"withdrawal." Contrary to the apparent belief of the Fourth Circuit, the law in effect

at the time Johnson's business was terminated did not impose any "withdrawal liability," Appendix at 17a, for the cessation of pension contributions resulting from an employer's going out of business. It provided merely a contingent liability, triggered by entirely different incidents — fund termination and the PBGC's decision to act as fund insurer. The liability was payable to PBGC, not the terminated fund. And, the reimbursement liability was prospectively applied and carefully limited in several respects. *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 382-86 (1980). Johnson was not "regulated *in the particular* to which [it] now objects" when it ceased business. *Veix* v. *Sixth Ward Bldg. Ass'n*, 310 U.S. 32, 38 (1940) (emphasis added). At that time it owed no statutory duties at all to the pension funds.

The Fourth Circuit's reliance on *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), also was misplaced. *Usery* upheld the constitutionality of a statute requiring employers to compensate employees who had left their jobs prior to enactment of the statute. To be sure, the statute had "some retrospective effect" insofar as it imposed liability for an injury "bred" in the past. *Id.* at 15-16. But, in application, it was almost entirely prospective. The liability imposed was triggered by the manifestation of a progressive disease whose "symptoms may become apparent only *after* a miner has left the coal mines." *Id.* at 7-8 (emphasis added). The employers were "not ordinarily [held] liable for any disabilities maturing before enactment"; the Government paid all claims filed for the first three-and-one-half years after enactment; and, the workmen's compensation was for a specific, physical injury caused by the dangerous working conditions controlled by the employers under which the miners labored,[9] a fact that distinguished *Railroad Retirement*

[9] In contrast, the unfunded liability allocated as withdrawal liability was not caused by any act of, or condition created by, Johnson or

Bd. v. *Alton R.R. Co.*, 295 U.S. 330 (1935), which petitioner submits is controlling here. 428 U.S. at 8-10, 15 & nn. 14, 18.

Moreover, in *Usery* the employers had not "specifically pressed the contention" that they would have acted differently. *Id.* at 17. That contention *is* pressed by this petitioner, which "would have avoided liability by altering [its] conduct" if its officers and directors "could have anticipated the potential liability attaching to [their] chosen course of conduct" that, under the law in effect at the time they acted, did not trigger the imposition of any liability. *Id.* at 17 n.16. *See* Riss Aff. ¶¶ 30-31, Appendix at 157a-158a.

This Court must resolve the inter-Circuit conflict created by the Fourth Circuit and, in the process, should attempt to harmonize *Untermeyer* and *Alton* on the one hand, with *Darusmont* and *Usery* on the other hand. In resolving the conflict, the Court also must consider the implications of its Contract Clause decisions such as *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), and *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), insofar as they inform the meaning of the

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Republic, but rather by forces wholly outside their control. Affidavit of Joseph LoCicero ¶ 16, Appendix at 191a-193a. As the financial "problem" of the funds that Congress sought to remedy, Appendix at 16a, was not caused by the employers, a blameworthiness rationale cannot justify the retroactive application of MPPAA. And, to the extent a cost-benefit analysis is relevant, it cannot *fairly* be said on the summary judgment record before the Court of Appeals that the "costs" being allocated to Republic are in any way commensurate with the "benefits" that either Republic or Johnson derived from their employees' labor. *Compare* Appendix at 18a, *with* Riss Aff. ¶¶ 43-50, Appendix at 160a-163a.

Due Process Clause.[10] *See also United States* v. *Security Industrial Bank*, 51 U.S.L.W. 4007 (U.S. Nov. 30, 1982).

Petitioner submits, however, that this Court is likely to foster further lower-court confusion in the future unless it squarely confronts a constitutional question raised below that the Fourth Circuit did not address, namely, whether the citizen's right to notice and fair warning is a "fundamental" one, or at least a sufficiently important one to trigger a different standard of review in assessing the constitutionality of statutes which impose an ostensibly "civil," but nonetheless disabling, liability triggered by pre-enactment conduct. Even if the standard of review described in *Usery* is appropriate for statutes having retrospective "effects" but which are substantially prospective in application, it is erroneous when applied to statutes, like MPPAA, which impose a new liability for primary conduct not triggering liability under the law in effect at the time the citizen acted. Such a statute infringes what petitioner submits is a "fundamental" right to "fair warning," *Marks* v. *United States*, 430 U.S. 188, 191-92 (1977), even if the liability imposed is labelled "civil," rather than "criminal," for irrespective of any "harsh and oppressive" effects on the citizen's property rights, *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 n.13 (1977), it also deprives the citizen of a significant liberty interest—the opportunity to choose one's course of conduct in light of the law in effect at the time one acts, an opportunity that cannot exist if, as the

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[10] Although rejecting petitioner's contention that retroactive application of MPPAA violates the Due Process Clause by enlarging petitioner's contractually defined contribution obligation to the pension fund, which was executed, as opposed to executory, at the time of MPPAA's enactment, the Court of Appeals made no effort even to distinguish *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), which was decided after the *Usery* case on which the Court otherwise relied.

Fourth Circuit ruled, a citizen is "required at peril of life, liberty or property to speculate" as to the outcome of bills pending in Congress. *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

This Court has unequivocally stated that it is a presupposition of any "rule of law" that the citizen is "*entitled* to be informed as to what the state commands or forbids." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972) (emphasis added). Fair warning of what the law is, not what it might or will become, is essential if the citizen is to have an opportunity to choose a liability-avoiding course of conduct. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Republic never had an opportunity to choose between corporate life and death in light of the law in effect when Johnson's business was terminated.

If the right to fair notice which this Court has described as an "elementary and fundamental requirement of due process," *Mennonite Bd. of Missions* v. *Adams*, 51 U.S.L.W. 4872, 4873 (U.S. June 22, 1983), is to receive the protection it deserves, the Court must articulate a standard of review for statutes which are retroactive *in application* that allocates the risk of error in favor of the citizen's fundamental right to notice and fair warning. When Congress seeks to legislate retroactively with respect to closed transactions and executed, as opposed to executory, contractual obligations, it should be required to advance an extraordinary justification for retroactive application of statutes creating new liability-imposing incidents, other than the deterrence of primary conduct, which prior Congresses chose to leave unregulated in the particular to which a subsequent Congress seeks to subject it to retroactive regulation. *See also INS* v. *Chadha*, 51 U.S.L.W. 4907, 4914-18 (U.S. June 21, 1983). As this Court said in *Usery*, courts should be "hesita[nt] to ap-

prove the retrospective imposition of liability on any theory of deterrence," 428 U.S. at 17, the very rationale on which retroactive application of MPPAA was justified by the Court of Appeals. Appendix at 18a.

II

The Other Constitutional Questions Are Substantial And Warrant This Court's Attention If Retroactive Application Of MPPAA Is Constitutional

Petitioner has raised a number of other constitutional challenges to MPPAA under the Fifth and Seventh Amendments, and Article III, that are substantial and warrant this Court's attention if the Court upholds the constitutionality of retroactive application of MPPAA. Although an inter-Circuit conflict does not yet exist, the Fourth Circuit's ruling on the other constitutional issues presented are inconsistent with prior decisions of this Court. The same issues have been raised in scores of cases now pending in the lower courts, and it makes little practical sense to have the many funds and employers affected by the Act, as well as the arbitrators and courts who must review fund determinations, using procedures for the assessment, collection and adjudication of "withdrawal liability" claims which are of uncertain constitutionality.[11]

The lower courts have uniformly rejected the argument that MPPAA's compulsory arbitration provision violates either the Due Process Clause or the Seventh Amendment. But this Court has declared compulsory

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[11] The questions respecting the constitutionality of MPPAA procedures and the taking-without-compensation issue, which were decided by the Fourth Circuit, are not presented in *PBGC* v. *R.A. Gray Co.*, No. 83-245 (U.S. filed August 15, 1983), as the Ninth Circuit mooted them by holding MPPAA unconstitutional as retroactively applied.

arbitration statutes unconstitutional in the past, *Wolff Packing Co.* v. *Industrial Court*, 267 U.S. 552 (1924), *Dorchy* v. *Kansas*, 264 U.S. 286 (1924), and these precedents have never been overruled. *See, e.g., Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974). And, the contrary authority on which the Fourth Circuit relied, *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320, 322 (1972), is distinguishable because it involved the delegation of adjudicatory power to a specialized administrative agency of the Government, not to a *private* arbitrator, for whom no qualifications are even prescribed by MPPAA.

Atlas Roofing Co. v. *OSHA*, 430 U.S. 442, 458 (1977), and *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), are likewise distinguishable for the same reason. A private arbitrator is not a federal administrative agency. Private arbitration is not administrative adjudication. And, the adjudication of money claims made by one private entity against another private entity do not involve any rights of the sovereign. *See*, 29 U.S.C. § 1302(b), (f) (Supp. V 1981). The Seventh Amendment has never been held applicable to the States, the source of "common law" rights and duties, and there is no "federal general common law." *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938). If Congress has power to compel the adjudication of every federal statutory right via *private* arbitration simply because the rights and the arbitral process are "unknown at common law," Appendix at 24a, then the Seventh Amendment imposes no lasting restraints on Congress at all, and the valued right to trial by jury becomes wholly dependent on Congressional discretion, which the Founding Fathers obviously sought to limit somehow by constitutional text. The Fourth Circuit's rationale, founded upon the erroneous assumptions that private arbitration is administrative adjudication, and that withdrawal liability demands for money involve "public rights," cannot be harmonized with prior decisions of this Court. *See, e.g.*,

Northern Pipeline Constr. Co. v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982); *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962).

The Fourth Circuit's rejection of petitioner's bias argument is also erroneous. It is precisely because the trustees are "fiduciaries" having a duty of undivided loyalty to fund beneficiaries, *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), that creates "an inherent bias in making overly liberal assessments of withdrawal liability so as to favor employees." Appendix at 20a. As the claimants of money, the trustees obviously have a pecuniary interest in the outcome of the "determinations" MPPAA requires them to make. That the trustees employ an actuary does not obviate their inherent bias, as the actuary is paid by, and subject to the direction of, the trustees in whom MPPAA vests the authority to make the statutorily mandated "determinations" later arbitrated. And, to suggest that the determination of the Fund's unfunded vested liability involves only "ministerial" or "mechanical" arithmetical calculations, Appendix at 21a, n.13, as opposed to an exercise of substantial *discretion*, is simply inconsistent with the summary judgment record. *See* Affidavit of Joseph LoCicero ¶¶ 9, 16.12, Appendix at 187a, 192a; Note, *Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures of [MPPAA]*, 71 Geo. L.J. 161 (1982).

Perhaps none of the foregoing factors, standing alone, renders the adjudicatory scheme violative of due process. But the trustees' bias is not cured by the provisions for arbitration and judicial review, for the trustees self-interested "determinations" are not subject to *de novo* review. 29 U.S.C. § 1401(a)(3). Regardless of any "actual" bias, the private arbitrator cannot be an "impartial" adjudicator, exercising *independent* judgment, in

the constitutional sense because he simply has no power of *de novo* review. *See North* v. *Russell*, 427 U.S. 328, 333-34 (1976); *Gibson* v. *Berryhill*, 411 U.S. 564, 577 & n.16 (1973); *Ward* v. *Monroeville*, 409 U.S. 57, 61-62 (1972).

That the arbitrator's award, in turn, is not subject to *de novo* judicial review also raises troubling Article III questions. If, as the Fourth Circuit held, the "determination" whether 29 U.S.C. § 1397(a)(2) (Supp. V 1981) applies involves a "nice question of fact and law," Appendix at 10a, how can Congress constitutionally "require such a [mixed] question [of fact and law] to be decided by [a *private*] arbitrator," Appendix at 10a, whose award is not subject to the *de novo* review of an Article III court, particularly when Congress has not even defined what a "facility" is? *Cf.*, *Northern Pipeline Constr. Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982); *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 712 F.2d 1305, (9th Cir. 1983). The private arbitrator to whom MPPAA commits the adjudication of a federal statutory right cannot be an "adjunct" of the District Court—like a federal bankruptcy judge or a federal magistrate—if his award is not subject to *de novo* review, and he certainly is not a properly constituted legislative court. *See, e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962).

And, notwithstanding the Fourth Circuit's blithe dismissal of petitioner's "taking" claim, Appendix at 25a-26a, a substantial question is presented under the Just Compensation Clause as well. MPPAA subjects petitioner to presumptively valid, potentially conclusive and immediately payable "withdrawal liability" claims that substantially exceed petitioner's entire net worth. 29 U.S.C. §§ 1399(c)(2), 1401(a), (b)(1). MPPAA does not regulate the use of property; it confiscates Peter's for the ultimate

benefit of Paul. Because MPPAA confers no reciprocal benefit on those whose property is taken, and because MPPAA's confiscatory effect is not "a mere 'consequential incidence' of a valid regulatory measure," the "analytical framework employed in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 194 (1978)," on which the Court of Appeals relied, simply does not fit this case. *United States* v. *Security Industrial Bank*, 51 U.S.L.W. 4007, 4009 (U.S. Nov. 30, 1982). *See Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965); *Brooks-Scanlon Co.* v. *Railroad Comm'n*, 251 U.S. 396 (1920); *In re Central R.R. Co. of New Jersey*, 485 F.2d 208, 213 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974).

Finally, the Fourth Circuit's conclusions that MPPAA's prepayment mandate is constitutional and that MPPAA's provisions are sufficiently precise to withstand due process scrutiny, are inconsistent with the record and wholly ignore that no process of any kind exists "to guard against the risk of initial error," *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 608 (1969), and protect petitioner from the pecuniary self-interest which infects the *ex parte*, standardless "determinations" of the fact and amount of liability made by the trustee claimants who establish the payment schedule.[12]

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[12] In asserting that it could not "perceive how payment of the periodic installments as they become due and owing could constitute a crushing economic burden on Republic," Appendix at 23a-24a, the Fourth Circuit simply ignored facts of record showing that compliance with the periodic payments demanded by all the funds which have asserted claims against Republic would constitute a crushing economic burden. *See* Riss Aff. ¶¶ 43-46, 48-49, Appendix at 160a, 161a, 162a. And, until an impartial adjudicator passes on the "determinations" of law and fact underlying the demand of a self-interested claimant, in what sense can it constitutionally be said the money is "due and owing" simply because it's been demanded? The

As one commentator has aptly said, the purpose and effect of the MPPAA provisions for the assessment, collection and adjudication of "withdrawal liability" disputes is to trade fairness for efficiency. Note, *Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures* of the [MPPAA], 71 Geo. L.J. 161 (1982). They raise substantial constitutional questions warranting this Court's attention should it uphold the constitutionality of retroactive application of MPPAA.

Court simply chose to ignore evidence that the "determinations" on which the payment schedule is based create a substantial risk of error and involve a substantial exercise of discretion. Affidavit of Joseph LoCicero ¶¶ 16.21-16.27, Appendix at 193a-200a. Indeed, in this very case, the Fund has admitted that its initial calculation of withdrawal liability was erroneous, Appendix at 201a-202a, has admitted uncertainty as to the meaning of the vague language defining when a permanent cessation of contributions is *not* a "withdrawal," 29 U.S.C. § 1383(d), and has determined that a truck terminal is not a "facility" within the meaning of 29 U.S.C. § 1397(a)(2), an arbitrable "determination" presenting a "nice question of fact and law," Appendix at 10a, the answer to which can hardly be regarded as self-evident since Congress did not even bother to define what a "facility" is, or any of the key terms of § 1383(d), which first applied in this case and then, *ipse dixit*, did not. This is delegation run wild that permits the arbitrary and capricious exercise of discretion by self-interested claimants. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972); *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari and accompanying Appendix were served, by first class mail, postage prepaid, this 29th day of September 1983 upon:

(a) Pursuant to Sup.Ct. Rule 28.3,

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